



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Determination Regarding Request for a 18 U.S.C. § 208(b)(1) Waiver

FROM: Kevin Minoli
Principal Deputy General Counsel and
Designated Agency Ethics Official

KSQ, June 4, 2015

TO: Joan Leary Matthews
Director, Clean Water Division
Region 2

I am writing in response to your request for an individual waiver pursuant to 18 U.S.C. § 208(b)(1) to allow you to complete your assignment as the Director of the Clean Water Division in Region II. Since May 7, 2012, you have been detailed to EPA under the Intergovernmental Personnel Act (IPA), 5 U.S.C. § 3371, *et seq.*, from your position as Senior Attorney in the Office of General Counsel in the New York State Department of Environmental Conservation (NYSDEC). Your IPA was extended on May 7, 2014 for an additional two years and will end on May 6, 2016, when you are required by law to return to your home institution for at least one year.

You serve as the Director of the Clean Water Division where your responsibilities include overseeing water issues for New Jersey, New York, Puerto Rico, the U.S. Virgin Islands and eight tribal nations. Since December 2014, you have been recused from participating in any particular matters involving the State of New York (hereinafter the "State" or "New York") because of a concern about a possible conflict of interest. The Office of General Counsel referred the issue to the Inspector General (IG), who in turn consulted with the Department of Justice (DOJ). We recently learned that DOJ declined prosecution and that the IG is closing its review without any further action. I acknowledge the hardship that this unexpected but necessary disqualification caused, both to you and to the region, and am now able to move forward with consideration of this waiver.

As you know, federal laws regarding conflicts of interest are critical to ensuring public confidence in the integrity of Agency decision making and are not swayed by personal interests. I want to begin by stressing that waiving one of these provisions should be done rarely, and only when granting the waiver is clearly in the interest of the United States.

You seek an individual waiver to allow you to continue to work on particular matters that affect the State through the end of your IPA assignment, which is May 6, 2016. After careful consideration of the facts, I am granting you a limited waiver of the requirements of 18 U.S.C. § 208(b)(1). Your appointing official, the Regional Administrator, agrees to this waiver.

Below I describe my application of federal law and guidance from the Office of Government Ethics to the specific facts of your request.

The State of New York

The entity with which you have a conflict of interest under 18 U.S.C. § 208(b)(1) is your employer of record, the State of New York, one of the jurisdictions included in EPA's Region II. EPA is responsible for maintaining and enforcing national standards under a variety of environmental laws, in consultation with state, tribal, and local governments. In carrying out its mission, EPA delegates some permitting, monitoring, and enforcement responsibility to the states and federally recognized tribes. Thus, like other states, New York is directly regulated by EPA but also serves as a co-regulator in carrying out our environmental mandate.

I conclude that the State in this instance is distinguishable from the other entities for which we usually adjudicate conflicts of interest. While its status as a "co-regulator" does not render federal conflict of interest laws inapplicable, it does weigh in my decision to grant a waiver in this case.

Your Role As It Relates to the State of New York

Your position of record is Senior Attorney in the Office of General Counsel in the New York State Department of Environmental Conservation (NYSDEC). Your specific title was Associate Commissioner in NYSDEC's Office of Hearings and Mediation Services, which is an independent office reporting directly to the Commissioner. In that position, you conducted hearings related to NYSDEC's permitting and enforcement activities under the Environmental Conservation Law, but were not affiliated with any of its regulatory programs, field personnel or legal personnel. While NYSDEC may intersect with EPA's programs, your position within the State included no official responsibilities related to EPA at all.

Since May 7, 2012, you have been detailed to EPA on an IPA assignment. Your current responsibility, as agreed to by the EPA and the State in the IPA agreement, is to work closely with the states, territories and tribal nations in Region II to provide direction and advice on surface water, drinking water, watershed management, wetlands, the National Pollutant Discharge Elimination System, dredging and ocean sediments, state oversight and water grant programs including Clean Water Act § 106 grants and the Clean Water and Safe Drinking Water State revolving funds. In agreeing to the IPA, first in 2012 and again for the renewal in 2014, the State authorized you to work for the benefit of EPA during your IPA assignment.¹ During your

¹ I note that the IPA agreement stipulated that you would not work on specific party matters involving New York during the first year of your IPA assignment. To the best of my knowledge, you adhered to that requirement.

detail you have not retained any responsibilities associated with your position of record in New York.

The Financial Interest at Issue

During the entirety of your IPA detail, EPA has paid and will continue to pay 100% of your salary (currently ~~(b)(6)~~ annually), while the State pays for your benefits, but you are not counted against the EPA employee ceiling.

Individuals detailed to EPA under an IPA are considered to be employees of their home institution "for all purposes except work and supervision," *see* EPA's IPA Policy and Procedures Manual, p. 1-3, but are also subject to the federal ethics statutes, including 18 U.S.C. § 208, which governs financial conflicts of interest. Pursuant to 18 U.S.C. § 208(a), executive branch employees are prohibited from participating personally and substantially in a particular matter that will have a direct and predictable effect on their financial interest or those interests that are imputed to them. Your permanent employment status with New York is an imputed financial interest of yours under this statute.²

Your Efforts to Obtain and Abide By Ethics Counselling

At the commencement of your IPA, you sought and obtained advice from the Office of Regional Counsel in Region II, and were informed about a one year cooling off period with the State that was memorialized in the IPA agreement itself. You were not, however, advised about any concerns under 18 U.S.C. § 208 about your imputed employment interest. When alerted to the oversight, you immediately recused from further participation in any particular matter affecting New York. I find that you did provide an agency ethics official with all of the relevant facts and that you relied in good faith upon the advice, or lack of advice, that you received. 5 C.F.R. § 2635.107.

The Legal Standard

As an individual serving in an IPA assignment, you are deemed an "employee" for the purposes of the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, and the federal conflict of interest statutes codified at Title 18 of the United States Code. *See* 5 C.F.R. § 2635.102(h) [defining "employee" as including "employees of a State or local government ... serving on detail to an agency, pursuant to 5 U.S.C. § 3371, *et seq.*"]. You are therefore prohibited from participating personally and substantially in an official capacity in particular matters in which you have a personal financial interest or in which you have an imputed interest under 18 U.S.C. § 208. The fact that you have been detailed from the State does not render this prohibition inapplicable. The statute is intended to prevent employees from allowing personal or imputed financial interests to affect their official actions and to protect

² I note that you participate in the New York State and Local Retirement System. Pursuant to the regulatory exemptions, this personal financial interest is not a disqualifying one that raises concerns under the federal conflict of interest statute. *See* 5 C.F.R. §§ 2640.201(c)(1)(ii), 2640.201(c)(1)(iii) and 2640.201(c)(2).

government processes from any actual or apparent conflict of interest.

Specifically, the statute states:

Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, ... participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be subject to the penalties set forth in section 216 of this title.

For the purposes of this provision, the financial interests of New York are imputed to you because you are their employee of record. Absent a waiver from this imputed interest, you are prohibited from participating in any particular matter that affects New York's financial interests.

18 U.S.C. § 208 provides for the possibility of obtaining a waiver of the requirements of the provision:

(1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee;

You seek a waiver under this provision.

Your Request for a Waiver

You seek a waiver from the financial conflict of interest statute for the limited period of this issuance date to May 6, 2016, when your IPA assignment ends and you will return to the State. This waiver will permit you to perform the responsibilities EPA and New York authorized you to perform under the terms of the IPA agreement itself.

Application of Applicable Law to Your Request for a Waiver and Decision

As EPA's Designated Agency Ethics Official, I am authorized to waive the criminal prohibition upon a written determination that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from you, the employee. Before I render a decision I must first, pursuant to 5 C.F.R. § 2640.303, consult with the Office of Government Ethics, where practicable, which I have done.

As stated at the outset of this memorandum, federal conflict of interest laws are critical to ensuring federal employees have the interests of the United States – and not their personal interests – in mind when performing their responsibilities as a federal employee. If Federal law identifies a set of facts as presenting a conflict of interest for a federal employee, that is a very serious matter and the employee and agency ethics officials should move swiftly to bring the conduct of the employee into compliance with federal law.

In this situation, I conclude that your employment status with New York does present an imputed financial conflict of interest of the sort prohibited by 18 U.S.C. § 208, absent a waiver or applicable regulatory exemption. The statute's prohibitions are not absolute, however, and specifically authorize an agency official to waive those prohibitions in certain limited circumstances. At EPA, I am the Designated Agency Ethics Official and, as such, have the authority to grant such a waiver. As stated above, I am required, if possible, to consult with the Office of Government Ethics before rendering my decision.

Having applied the applicable law and Office of Government Ethics guidance to the facts of this case, I have concluded that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from you from now until May 6, 2016, and therefore grant you a waiver from the prohibitions contained in 18 U.S.C. § 208 during that time period.

Legal Analysis

As articulated in the statute itself and in guidance from the Office of Government Ethics, the key determination for a deciding official is whether the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from the employee. In applying the factors articulated by the Office of Government Ethics at 5 C.F.R. § 2640.301(b), I find that:

- You and New York are the "persons" whose financial interests are involved;
- You are currently on an IPA assignment from New York, although EPA pays your salary and benefits, including a supplementation of your state salary to be commensurate with the rate of pay for an EPA employee in this position;
- The disqualifying financial interest arises from your employment status with New York, which raises the potential for gain or loss for the State as a result of government action that you may participate in as part of your EPA duties;

- Your employment status with New York is of substantial financial interest to you³
- Your position as EPA Region II's Water Division Director involves your personal and substantial participation in particular matters that involve New York specifically, including decisions or recommendations about grants, permits and other specific party matters; and
- Both EPA and New York specifically assigned you to work on water-related issues that include that state.

I have considered these factors carefully. I find that your imputed interest is a financial conflict of interest for you. Under the statute, therefore, the only remaining question is whether the interest "is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee." In considering this aspect of the statutory test, the fact that you are on an IPA is particularly relevant.

By signing the IPA agreement, EPA and the State both assigned you to work on water-related issues that include the State, and both affirmed that commitment with the IPA renewal in 2014. The "integrity of the services" that the State and EPA expect from you in your current position is to fulfill your duties to the best of your ability to benefit both organizations. Frankly, when approving your IPA initially and in renewing it, the State recognized that your EPA scope of work would entail working directly on particular matters that involved it after the first year, but placed no parameters on your ability to represent EPA's interests over theirs. There was no limit on the performance of those duties even if those duties were not fully aligned with the interests of the State on a particular matter.

In passing the IPA, Congress clearly intended for an exchange of personnel and expertise between federal government and other entities, including states. To refuse to consider a waiver at all, or to dramatically limit one, would seem to defeat that intention. I therefore conclude that your imputed financial interest in the State is not likely to affect the integrity of the services that the United States Government and EPA expect from you, so I am granting this limited waiver.

Conclusion

Based on the factual circumstances of this request, including the expectations of the State and EPA that you are performing work to benefit both organizations, and the limited nature of the request, I hereby grant the request for a waiver under 18 U.S.C. § 208(b)(1).

This waiver is limited in nature and permits only your official participation in particular matters that arise in Region II that you would be participating in as part of your assigned duties as the Director of the Clean Water Division. This waiver will automatically become void and cease to be effective upon termination of your detail. You are aware that this limited waiver will cease to be effective on May 7, 2016.

³ As noted previously, your participation in the state retirement system is not a disqualifying financial interest.

You understand that you remain a federal employee while on the IPA assignment, subject to the Standards of Ethical Conduct for Executive Branch Employees, 5 C.F.R. Part 2635, and the criminal conflict of interest statutes, 18 U.S.C. §§ 203, 205, 207, 208, and 209, as well as other applicable laws. If you have questions about whether a certain matter is covered by this waiver, or whether an action you may take while on detail implicates the ethics laws, you are directed to promptly seek assistance from Justina Fugh, Senior Counsel for Ethics, or me.

Finally, pursuant to 5 C.F.R. § 2640.304, a copy of this waiver will be made available upon request to the public in accordance with the procedures described in 5 C.F.R. § 2634.603. In making this waiver publicly available, certain information may be withheld in accordance with 5 C.F.R. § 2640.304 and 5 U.S.C. § 552.